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No. 93-880

In The

Supreme Court of the United States

October Term, 1993

JUDY MADSEN, ED MARTIN, AND SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMEN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., AND CENTRAL FLORIDA
WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF AMICUS CURIAE OF NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS DEALT WITH HEREIN

Whether special rules of law should be rejected in abortion-related cases so that:

(1) the standing of private parties to assert governmental interests in law suits between purely private parties is not recognized; and

(2) private parties are not permitted to assert constitutional rights against nongovernmental action.

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BRIEF AMICUS CURIAE OF NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and about 3,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various lawful political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the primary promoters of laws restricting abortion to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within the limits set by those decisions and have sought, through lawful means, those changes in the law which would allow full legal protection for the unborn. The National Right to Life Committee, Inc. seeks to advance its interests by addressing the legal issues herein.

[1]This brief is filed with permission of all the parties. A letter granting the consent of both the Petitioners and the Respondents "to the filing of any and all amici briefs in support of the Petitioners" has been filed with the Clerk of this Court by Counsel for the parties. A courtesy photocopy of said letter has been supplied to the Clerk of this Court contemporaneously with the filing of this brief.

SUMMARY OF THE ARGUMENT

While the National Right to Life Committee, Inc. has adopted a policy against engaging in illegal activities in opposition to abortion, the injunction in this case sweeps up constitutionally-protected free expression and assembly rights in a public forum along with activity unlawful under Florida law. The National Right to Life Committee, Inc. seeks to protect the right of abortion rights opponents to engage in peaceful expression activities, including picketing, handbilling, and solicitation in any public forum, including the sidewalks around abortion facilities. In the past, abortion has worked a distortion wherever it touched on the law, as abortion was made into a super-protected right. Your amicus notes an encouraging trend toward applying legal rules uniformly in abortion cases as in other cases. In the present case your amicus prays the Court to continue this trend by (1) denying standing to the private-party Respondents to assert governmental interests in support of their position and (2) rejecting the effort to support an injunction against private action by asserting constitutional rights, which only protect against state action.

ARGUMENT

The National Right to Life Committee, Inc. ("NRLC") has formally adopted a policy which prohibits its officers, employees, members, and affiliated organizations from participating in or promoting illegal activity in opposition to abortion. The Florida injunction at issue in this case sweeps extremely broadly, reaching not only illegal activity but expressive activity which is protected by the First Amendment to the United States Constitution. For example, the injunction places a constitutionally unjustified prior restraint on peaceful picketing, literature distribution, and in-person communication conducted in a traditional public forum done by supporters of only one side in the abortion debate. It is infringement of this constitutionally-protected activity which NRLC opposes in the present brief.

In seeking to protect constitutionally-guaranteed free expression, National Right to Life Committee, Inc. is particularly concerned: in general, (1) that special rules of law not be applied in abortion cases, and, specifically, (2) that private parties not be allowed to assert state interests on their own behalf, and (3) that the right to abortion not be subject to special protection against private actions but be recognized as a right solely against state action. These issues are the subject of this brief.

I. Normal Rules of Jurisprudence Should Govern This Abortion Case.

Roe v. Wade, 410 U.S. 113, was intended to settle the issue of abortion in American law. That the present case is before the Court demonstrates that *Roe* did not settle the abortion issue. Rather, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. In fact, in the recent case of *Planned Parenthood of S.E. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), three members of this Court created a new controlling analysis for abortion jurisprudence, the "undue burden" test, *id.* at 2803 (O'Connor, Kennedy & Souter joint opinion), rejecting the analysis originally created by *Roe*.

In the past, rigid and expansive application of *Roe* has worked a distortion on the normal functioning of the law wherever touched by abortion. This abortion distortion effect has been evident in several areas, some of which are set forth below. Yet, as also noted herein, this Court has recently shown a willingness to move away from creating special rules of law in abortion cases. Your amicus urges the court to again, in this case, reject the past practice of treating abortion as a "super-protected" right, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 935 (1973), and apply normal rules of law to protect legitimate free expression guaranteed by the First Amendment.

A. *In Prior Cases, Rigid Adherence to an Expansive Interpretation of Roe Has Wrought a Distortion in the Normal Rules of Law.*

In the cases decided after *Roe v. Wade* up to the time of *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), an expansive interpretation of *Roe* was employed to strike down even the most modest regulations of abortion. In the process, related areas of the law were warped from their normal development patterns. Some of the results are briefly cataloged below. Another discussion, regarding the issue of standing, is discussed in the context of Section II, *infra*. The purpose of this discussion is to highlight how easily the Court in the past has slipped into a special-protection mode with regard to abortion and to urge the Court in this case to follow its more recent trend of applying the rules of law more uniformally and neutrally to abortion-related cases.

1. *Roe* Has Confused the Law Protecting the Unborn in Non-Abortion Contexts.

One of the areas in which the abortion distortion effect is most evident is in the law designed to protect preborn human beings in non-abortion contexts. In these areas, *Roe* poses a direct obstacle to the realization of important objectives embodied in laws which recognize and protect unborn human life, in that it has inhibited development of the law in these areas. However, where the abortion choice is not the issue, many courts have rejected the *Roe* rationale. Examples include the rights of the unborn in tort law, in wrongful death actions, in equity, in criminal law, and in laws relating to respect. *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Public Law 246-83 (1989) (discussing the abortion distortion effect of *Roe* on fetal rights in non-abortion contexts). A few examples are provided below.

a. Tort Law

The development of the law in the area of torts reveals the dramatic change in the legal protection of the rights of unborn human beings with the progress of scientific knowledge about the fact that each unique, individual human being comes into being at the moment of conception.

The first American case which dealt with fetal injury was the celebrated opinion by Judge Oliver Wendell Holmes, Jr. in *Dietrich v. Northampton*, 138 Mass. 14 (1884). Holmes interpreted the Massachusetts wrongful death act to preclude recovery for the death of a four to five month old fetus.[2] He held that "the unborn child was a part of the mother at the time of the injury" and that "any damage to [the fetus] which was not too remote to be recovered for at all was recoverable by her." *Id.* at 17.

Dietrich was followed until 1946, when, in the words of William Prosser, there occurred "the most spectacular [and] abrupt reversal of a well settled rule in the whole history of the law of torts." W. Prosser, *Handbook on the Law of Torts* 336 (4th ed. 1971). In *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C 1946), a federal court allowed the plaintiff infant to recover for injuries sustained when he was negligently taken as a viable fetus, from his mother's womb by the defendant doctor. *Id.* at 143. The *Bonbrest* court reasoned:

> As to the viable child being "part" of its mother-this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extrauterine life — and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a "part" of the mother in the sense of a constituent element — as that term is generally understood. Modern

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[2]The fetus lived for "ten or fifteen minutes" after premature birth, 138 Mass. at 15. Nevertheless, the court referred to the newborn as an "unborn child." *Id.* at 17.

> medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable foetus is not a part of its mother.

Id. at 140.

Since *Bonbrest*, every state has recognized prenatal harm as a legitimate cause of action for a child subsequently born. *Prosser and Keeton on the Law of Torts* 368 (W. Keeton ed. 5th ed. 1984). Some states limit recovery to post-viability injuries (some doubtless influenced by *Roe*), but the clear trend is toward recovery for all prenatal harm. *Prosser and Keeton*, *supra*, at 368-69; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349, 357 (1970). The first court to abandon the viability standard declared what ought to be the guiding principle for all courts: "[L]egal separability should begin where there is biological separability." *Kelly v. Gregory*, 282 A.D. 542, 543, 125 N.Y.S.2d 696, 697 (1953). The court noted that it was the knowledge derived from medical science which powered the engine for change. *Id.* at 543-44, 125 N.Y.S.2d at 697-98. Yet despite the recognition of the rights of the unborn in this area, *Roe* has constrained the full development of the law protecting the unborn, as shown in the following examples.

b. Wrongful Death

A majority of jurisdictions now recognize a wrongful death cause of action for the death of a preborn human being — some rejecting the action unless the child is born alive and then dies and some allowing only post-viability actions. *Roe* has been cited by courts rejecting wrongful death actions for preborn humans[3] and by courts limiting the cause of action to viable

[3]*See, e.g., Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (en banc); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Hogan v. McDaniel*, 204 Tenn. 253, 559 S.W.2d 774 (Tenn. 1977).

unborn children.[4] *Roe*'s viability line makes no more sense in wrongful death actions than it made in *Roe*, but *Roe*'s pernicious effect on this part of the law is clear.

c. Wrongful Birth

Roe v. Wade has even been used by courts recognizing wrongful birth claims, wherein parents seek damages for the birth of a "defective" child whom they would have aborted if they had been apprised of the defect. As of September 1988, seventeen state courts of appeal had recognized a wrongful birth claim. Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461, 462 (1989).

d. Homicide

Following the English statutory and common law pattern, early nineteenth century American law prohibited feticide by statutes which also encompassed abortion and, in some cases, by common law. *See* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250, 1273-82 (1975). For example, New York in 1828 made it a felony to willfully cause the death of a fetus even before quickening. J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 26-27 (1978) (citing N.Y. Rev. Stat. pt. IV, ch. I, tit. II, §§8, 9 at 550). When *Roe v. Wade* swept away the state abortion statutes the protection provided the unborn from homicide was also swept away.

Roe has had a detrimental effect on the states' efforts to protect the unborn from homicide outside the abortion context.

[4]*See, e.g., Toth v. Gorve*, 65 Mich. App. 296, 237 N.W.2d 297 (1975); *Wallace v. Wallace*, 120 N.H. 675, 421 A.2d 134 (1980) ("We remark also in passing that it would be incongruous for a mother to have a federal constitutional right to deliberately destroy a nonviable fetus, Roe v. Wade [citation omitted], and at the same time for a third person to be subject to liability to the fetus for his unintended but merely negligent acts."); *Werling v. Sandy*, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985).

For example, the California Supreme Court overturned a murder indictment brought against a man for killing an unborn child by kneeing his ex-wife's abdomen, saying, "I'm going to stomp it out of you." *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc), by applying the archaic born-alive rule. When the California legislature promptly redefined the homicide statute to expressly include the killing of a fetus, a California appellate court declared that *Roe* had removed the protection of a non-viable fetus because "as a matter of constitutional law the destruction of a non-viable fetus is not a taking of human life." *People v. Smith*, 59 Cal. App. 3d 751, 755, 129 Cal. Rptr. 498, 502 (1976). Following the California courts and *Roe*, many states have held that *Roe* denies the protection of homicide laws to the unborn.[5] This anomalous result further shows *Roe*'s distorting effect on the law.

2. *Roe* Has Distorted the Law Regarding Rules of General Application.

Roe v. Wade also set procedural precedents for distortion of common rules of adjudication. *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. at 299-350. This was especially evident in *Thornburgh*, 476 U.S. 747, the high-water mark of *Roe*'s analysis. Some examples follow.

a. Statutory Construction

The abortion distortion factor was at work in the *Thornburgh* decision where this Court ignored the principle that a court should avoid constitutional problems by giving a statute a constitutional construction where fairly possible. The Pennsylvania law at issue in *Thornburgh* required a second physician to be present at post-viability abortions to care for the possibly surviving child. 18 Pa. Cons. Stat. Ann. §3210(c) (Purdon

[5] *See, e.g., State v. Gyles*, 313 So. 2d 799 (La. 1975); *State v. Brown*, 378 So. 2d 916 (La. 1979); *State v. Soto*, 378 N.W.2d 625 (Minn. 1985); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983).

1983). For emergency purposes, the law provided that it is "a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, . . . that the abortion was necessary to preserve maternal life or health." *Id.* Although in *Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476, 482-86 (1983), this Court construed a similar second-physician provision to include an emergency provision for the life or health of the mother — even though none existed — this Court could not bring itself to do so in the Pennsylvania case and struck down the statute. *Thornburgh*, 476 U.S. at 771.

Justice White took the *Thornburgh* majority members to task for their willingness to disregard this principle of statutory construction:

> The Court's rejection of a perfectly plausible reading of the statute flies in the face of the principle — which until today I had thought applicable to abortion statutes as well as to other legislative enactments — that '[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.' *Planned Parenthood Ass'n v. Ashcroft* [citation omitted]. The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.

Thornburgh, 476 U.S. at 812 (White, J., dissenting). *See* Bopp & Coleson, *The Right to Abortion*, *supra*, at 315-32 (extended discussion of abuse of the above principle in abortion cases).

b. Evidentiary Standards Applicable to Preliminary Injunction Hearings

Another example of the abortion distortion effect at work is also found in *Thornburgh*, where this Court rushed to a judgment on the merits from the appeal of a grant of a preliminary injunction. Shortly before the statute at issue in *Thornburgh* was to go into effect (but four months after the statute had been enacted), the plaintiff abortion providers filed forty affidavits,

which became the basis of a court-ordered stipulation, and requested a preliminary injunction. Pennsylvania was not allowed to contest Plaintiffs' facts unless it could give evidence at the hearing on the preliminary injunction. Because of the limited time available, no evidence was submitted by the state. Brief for Appellant at 35-49, *Thornburgh*, 476 U.S. 747. The parties were assured that the stipulation would be used solely for the purpose of the hearing. *Id.*

However, on appeal, the appellate court went to the merits and held the Pennsylvania abortion law largely unconstitutional. *Id.* at 8. The *Thornburgh* Court followed suit. In dissent, Justice O'Connor noted the abortion distortion effect at work in these words: "If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents."

B. *In Recent Cases, This Court Has Increasingly Rejected The Abortion Distortion of the Normal Rules of Law.*

In recent years, the Court has shown more of a willingness to uphold minimal abortion regulations, beginning to return to the notion that the right to abortion is not an absolute right which overrides all other rights and rejecting the notion that all the rules must be bent to achieve the triumph of the abortion right. This is evident beginning in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (upholding state ban on use of public facilities and employees to perform or assist with most abortions) and extending to the cases of *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (upholding two-parent notification with judicial by-pass for minors seeking abortion); *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (upholding parental notice for minors with judicial by-pass); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding federal regulations barring Title X programs from counseling or referring for abortion); and *Planned Parenthood of S.E. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992) (upholding

informed consent requirements and a 24-hour waiting period similar to those struck down in earlier cases decided by this Court).

The case of *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), is a recent example of this Court's unwillingness to stretch the law to accommodate the desires of abortion rights partisans. *Bray* is on point with the case at bar in its holdings that abortion is a right protected only against governmental interference, *id.* at 762, 764, so will be discussed at length *infra*. For the present, it may be said that *Bray* represents a part of the post-*Thornburgh* departure from the old abortion-distortion approach to the law.

However, from the decision of the Florida Supeme Court in the case at bar, it is evident that this change has not affected all other courts. Your amicus respectfully requests this Court to follow its recent pattern and apply the rules of law neutrally in the present case as well. Two areas of special concern are discussed below.

II. Private Parties Do Not Have Standing to Assert Governmental Interests in Support of Their Position.

The subject of standing is another area in which the abortion distortion effect has been evident in the past. *Roe v. Wade* set forth the requirements of justiciability and standing. *Roe*, 410 U.S. at 123. A party must "establish[] that personal stake in the outcome of the controversy that ensures that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* (citations and internal quotation marks omitted). The *Roe* Court decided that Jane Roe had standing and her case was not moot, *id.* at 125, despite the observation of then-Justice Rehnquist that there was nothing in the record to indicate that Roe was in her first trimester at any time "during the pendency of her lawsuit." *Id.* at 171 (Rehnquist, J., dissenting). Since Roe could have been in the last trimester of preg-

nancy when her complaint against the Texas abortion statute was filed, and *Roe* held that the state could proscribe abortion after viability (absent a threat to the life or health of the mother, which was not alleged), Jane Roe may never have had standing. *Id.*

Justice Rehnquist observed that the failure to abide by normal standing rules in *Roe* resulted in a "hypothetical lawsuit," *id.* at 172, which was used as a "fulcrum," *id.* at 171, to remove any significant regulation of abortion from the first trimester. *Id.* at 171-72. By so doing, Justice Rehnquist noted, "the Court depart[ed] from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* at 172.

The procedural laxity in *Roe* and subsequent abortion case was criticized by dissenters, *Roe*, 410 U.S. at 172, and legal scholars, *see, e.g.*, Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159. However, it became a procedural precedent for other courts to deal in a lax manner with standing in abortion cases. *See, e.g., Margaret v. Edwards*, 764 F.2d 994, 997 (5th Cir. 1986); *Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1396 & n.4 (6th Cir. 1987). *See also* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. at 299-350 (a broader discussion of the abortion distortion effect on procedural and adjudicatory principles). It is hoped that the Court's more neutral approach to abortion jurisprudence will be evidenced in its treatment of the standing issue in abortion-related cases.

In extending the usual rules of standing, this Court also extended jus tertii standing to abortionists to assert the rights of women seeking abortion, despite the potential conflict of interest and the fact that the usual rules of standing would not allow recognition of such standing. *Id.* at 306-15. In *Singleton v. Wulff*, 428 U.S. 106 (1976), a weak plurality was mustered with four justices favoring such jus tertii standing and one

concurring because the physicians involved already had standing of their own (while questioning the logic of the other four). *Id.* at 121-22 (Stevens, J., concurring). A strong four-member dissent was written by Justice Powell. *Id.* at 124 & n.3. Justice Blackmun wrote the plurality opinion and began by noting that "[f]ederal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons . . . ." *Id.* at 113.

While extended discussion of the rightness or wrongness of the decision in *Singleton* is unnecessary at present, the standard for allowing a party to assert the rights of third parties must be examined.[6] Justice Blackmun stated that there were two elements: (1) the relationship between the litigant and the third party must be such that the latter's "right is inextricably bound up with the activity the litigant wishes to pursue," *id.* at 114, and (2) "some genuine obstacle" must exist to prevent the third party from asserting its own right." *Id.* at 116.

Applying these factors to the case at bar, it is evident that the private party abortion clinics do not have jus tertii standing to assert the rights of the State of Florida or any other governmental entity. Nor should the Florida courts be able to justify a remedy for a private party, which impinges upon the constitutional free expression rights of citizens, by relying on governmental interests (1) which are not "inextricably bound up with" the performance of abortion business by the abortion clinics and (2) where there is no "genuine obstacle" preventing the State of Florida or any subdivision thereof from asserting its interests at issue in a statute or ordinance (or by intervening in this case). Rather, the Florida courts purport to be resolving a case between private parties. There is no basis, then, for interposing governmental interests in support of an injunction in favor of Respondents.

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[6]The abortion-facility Respondents herein also assert the rights of women seeking to use their services. As seen from this brief discussion and Justice Powell's dissent in *Singleton*, there is a weak foundation for this jus tertii assertion of the rights of others by the abortion facilities, too.

Despite the failure of the Respondents to meet the standing test for asserting third party governmental interests, in the case at bar, the Florida courts have followed a relaxed rule of standing by allowing private parties to assert governmental interests and by relying upon such interests as justification for the injunction at issue.

While ordinarily parties may assert only their own interests in a case, in the decision of the Florida Supreme Court appealed herein, that court considered a variety of governmental interests. The court argued that "[n]umerous government interests, all of which rise to the level of 'significant' or higher are apparent." *Appendix to Petition for Writ of Certiorari* (hereinafter "*Appendix*") at A-15. These were listed by the court as follows:

> Our state has a strong interest in protecting the constitutional rights, both state and federal, express and implied, of all Florida's citizens, including its women. A woman's freedom to seek lawful medical or counseling services in connection with her pregnancy constitutes a clear personal right under both our federal and state constitutions. See *Roe v. Wade*, 410 U.S. 113 (1973) [parallel citations omitted]; *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989). Our state also has strong interests in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting property rights of all Florida's citizens.

Id.

The Florida Supreme Court also observed that this Court, in *Frisby v. Schultz*, 487 U.S. 474 (1988), upheld a city ordinance banning all residential picketing "not[ing] that 'the protection of residential privacy' constitutes 'a significant governmental interest.'" *Appendix* at A-15 (quoting *Frisby*, 487 U.S. at 484). The Florida Supreme Court further argued "that the reasoning underlying this government interest in residential privacy applies even more convincingly to the state interest in ensuring medical privacy." *Appendix* at A-16.

In response, it must first be noted that *Frisby* involved a duly-enacted ordinance and the City of Rockford was a party. In short, it was an example of *government* asserting governmental interests. Public safety, traffic flow, and similar interests are normally protected by legislative enactments (at whatever governmental level), in which appropriate legislative action is taken to assert these governmental interests. Private parties may not come into court to assert them.[7]

This observation highlights the problem with the actions of the Florida courts, namely, that this action arose as a conflict between private parties. No governmental entity was involved as a party in this case. Therefore, it was improper for a court to consider on behalf of private parties interests which only the government had standing to assert.

Your amicus recognizes that in order to justify infringement of free expression a state actor must demonstrate, *inter alia*, significant state interests to justify the infringement. For this reason, governmental interests are being argued in this case to attempt to justify the action of the state court in enjoining free speech. However, this ignores the posture of the case.

This case arose as a private action between two parties. Therefore, any invocation of governmental interests is done so on behalf of the abortion facilities who were Plaintiffs below and are Respondents herein.

When the trial court enjoined free speech, it became the state actor infringing on free speech, and the First Amend-

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[7]Similarly, the case of *Grayned v. City of Rockford*, 408 U.S. 104 (1972), on which the Florida Supreme Court relied, *Appendix* at A-22, was based on an ordinance banning noise disturbing to schools. Because there was a governmental actor, consideration of constitutional principles concerning free speech was appropriate (a subject dealt with in more detail *infra*) and consideration of state interests was appropriate. *Grayned* did not originate as a conflict between private parties, as has the case at bar. Therefore, the assertion that *Grayned* provides a justification for limiting free speech in the case at bar due to asserted state interests by a private party is erroneous.

ment analysis asks whether the state actor, *inter alia*, acted in furtherance of significant state interests. For the Florida courts then to affirm the action of the trial court on the basis of significant governmental interests is to create a bootstrap device to pull in governmental interests in favor of an action done on behalf of a private party (which could not assert those interests in its own behalf).

This is uniquely different from the usual situation where a legislative body passes a statute infringing upon free speech and the courts ask whether there were significant governmental interests to justify the infringement. In effect then, the assertion of governmental interests in this case is done both by and on behalf of the Respondent abortion facilities herein, which are solely private parties and not entitled to raise the rights of the third party State of Florida or its political subdivisions. Therefore, for the trial court to accept arguments about avoiding disruption of public services and to employ them as a basis for its injunction is to take into account interests not rightly before it because they were not the interests of any party. If the State of Florida or any city in the state was concerned about traffic flow and the like, it could enforce statutes already on the books. If there was truly a disruption of traffic flow (and the evidence showed little if any) as a result of free speech activity, the city was responsible to enforce its own ordinances and the remedy of the abortion facilities was to call the police and point out the problem. It was not the trial court's job to enforce city traffic ordinances — without the city even acting to assert its interest — by injunctive penalties at the behest of private parties without standing to raise the issues.

III. The Right to Abortion Is Protected from Governmental Action, So That the Right Is Not Subject to Special Protection Against Private Actions.

The Supreme Court of Florida in its assertion of interests sought to be protected in the case at bar also stated that:

> Our state has a strong interest in protecting the constitutional rights, both state and federal, express and implied, of all Florida's citizens, including its women. A woman's freedom to seek lawful medical or counseling services in connection with her pregnancy constitutes a clear personal right under both our federal and state constitutions. *See Roe v. Wade*, 410 U.S. 113 (1973) [parallel citations omitted]; *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989).

Appendix at A-15. While this is true, it ignores the fact that no governmental entity is a party in this case. This case is about a conflict between purely private parties. As a result, concerns over constitutional rights are irrelevant.

Constitutional rights protect persons against actions by government, not private parties. Therefore, if there is a constitutional right to abortion, it is a right which prohibits states from limiting that right in an unconstitutional fashion. It does not prevent private actors from limiting that right. While interference with constitutional rights may also generate legal claims under state law, the fact that one may have a constitutional right to engage in certain action in no way should heighten the state law rights of the one wronged.

This Court dealt recently with an effort by abortion rights activists to turn ordinary state cases into federal cases in *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, and rejected the effort. In *Bray* the claim was made that the anti-conspiracy prohibitions of 42 U.S.C. § 1985(3) could be enlisted in the effort of abortion facility owners to prevent protest activities of certain abortion rights opponents. This Court rejected the effort, holding that:

> A § 1985(3) private conspiracy "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . . ," requires an intent to deprive persons of a right guaranteed against private impairment. [Citations omitted.] No intent to deprive of such a right was established here.

Id. at 762. This Court held that there was no evidence of an intended violation of the right to travel interstate, *id.*, which is protected against private action. Neither was there a violation of the right to abortion because "deprivation of that federal right (whatever its contours) cannot be the object of a purely private conspiracy." *Id.* at 764. "The statute does not apply . . . to private conspiracies that are 'aimed at a right that is by definition a right only against state interference . . . .'" *Id.* This Court held that "[a]bortion is not among" the few rights protected against "private as well as official encroachment." *Id.*

This Court developed the thought further:

> It would be most peculiar to accord [abortion] that preferred position, since it is much less explicitly protected by the Constitution than, for example, the right of free speech rejected for such status in *Carpenters*. Moreover, the right to abortion has been described in our opinions as one element of a more general right of privacy, see *Roe v. Wade* [citations omitted], or of Fourteenth Amendment liberty, see *Planned Parenthood of Southeastern Pennsylvania* [citation omitted]; and the other elements of those more general rights are obviously not protected against private infringement.

Id.

Justice Scalia for the Court further observed that "[a] burglar does not violate the Fourth Amendment, for example, nor does the mugger violate the Fourteenth." *Id.* While in many situations where a legal wrong is done there would also be a constitutional right claim if the wrong were done by a state actor, that fact cannot be used to somehow heighten or justify the remedy available against the wrongdoer. However, such an effort has been made in the case at bar.

The Florida Supreme Court said: "We conclude that the reasoning underlying this government interest in residential privacy [in the *Frisby* case] applies even more convincingly to the state interest in ensuring *medical privacy.*" *Appendix* at

A-16 (emphasis added). In setting forth the authority for a woman's "medical privacy" right, i.e., her "freedom to seek lawful medical or counseling services in connection with her pregnancy" the Florida Supreme Court cited *Roe v. Wade* and *In re T.W.*, 551 So.2d 1186, 1193 (1989), both of which deal with constitutional rights. *Appendix* at A-15.

The Florida Supreme Court also wrote:

> This rule [in *Grayned v. City of Rockford*, 408 U.S. 104 (1972)] is particularly apt in the present case, where demonstrators' tactics have impaired the functioning not of a school but a licensed medical facility and have placed in jeopardy the health, safety, and *rights* of Florida women.

Id. at A-23 (emphasis added).

This right to "medical privacy" and these "rights of Florida women," which supposedly makes limitations on free speech even more appropriate with regard to abortion facilities than with regard to schools, are constitutional rights. Constitutional rights are only protected against governmental action. The rights asserted cannot in any way be relevant in the case at bar and ought not to be used in the context of an *a fortiori* argument in this case to enhance or justify the remedy available to the abortion facilities against those who would exercise their right to free speech which *ought* to be protected against infringement by a Florida court's injunction.

This Court has rejected the creation of speech-free zones in a number of contexts. These include such significant places as courthouses, *United States v. Grace*, 461 U.S. 171 (1983), schools, *Grayned*, 408 U.S. at 119 (peaceful sidewalk picketing may not be banned), embassies, *Boos v. Barry*, 485 U.S. 312, 333 (1988), businesses, *Thornhill v. Alabama*, 310 U.S. 88 (1940), and homes, *Frisby*, 487 U.S. 474 (only targeted, single-residence picketing may be banned). Peaceful picketing, handbilling, and solicitations at any of these sights may be disturbing to those within, but that is insufficient to override the First Amendment. Similarly, in the case at bar, the fact that women

at an abortion facility may also be exercising a constitutional right adds nothing to the equation to justify the limitation of other persons' constitutional rights, i.e., the rights of free expression. Persons in any of these other situations might be exercising their own constitutional rights, e.g., their own right of free expression. Yet, the First Amendment has no affect in the evaluation of legal wrongdoing and available remedies absent state action. Constitutional rights only protect against state action.

CONCLUSION

In conclusion, your amicus prays the Court to strike down the injunction at issue in this case as being an unconstitutional violation of the rights of Petitioners and others to engage in free assembly and expression as guaranteed by the First Amendment. The injunction is not protected from constitutional infirmity by governmental interests improperly considered by the lower courts nor by constitutional rights where there is no state action. The old pattern of creating special rules in abortion cases should be entirely abandoned and abortion should be treated like an ordinary constitutional right (if indeed there must be a right to abortion in this Court's jurisprudence), subject to the usual rules of procedure and principles of adjudication.

Respectfully submitted,

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